

## ORAL ARGUMENT NOT YET SCHEDULED

**SUPPLEMENTAL APPENDIX**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**NO'S. 22-3038, 22-3039 & 22-3041**

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UNITED STATES OF AMERICA,  
*Appellant*

v.

JOSEPH W. FISCHER, EDWARD LANG, and GARRET MILLER,  
*Appellees,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
D. CT. NO'S. 1:21-CR-234, 1:21-CR-119, 1:21-CR-53 (NICHOLS, J.)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

CR Action  
No. 1:21-234

vs.

Washington, DC  
May 3, 2022

JOSEPH W. FISCHER,

1:40 p.m.

Defendant.

TRANSCRIPT OF IN-PERSON ORAL ARGUMENT/STATUS CONFERENCE  
BEFORE THE HONORABLE CARL J. NICHOLS  
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

**DEPUTY CLERK:** Your Honor, this is criminal case year 2021-234, *United States of America versus Joseph W. Fischer*.

Counsel, please come forward and introduce yourselves for the record, beginning with the government.

**THE COURT:** And as I said in the earlier hearing, my current practice is -- obviously I'm not masked -- whoever is at the podium, take off your mask, if you are comfortable with that, opposing counsel, court reporter, deputy and put your mask back on at counsel table.

**MS. LOEB:** Your Honor, Alexis Loeb for the United States. With me is my colleague James Pearce.

**THE COURT:** Counsel.

**MS. GAYNOR:** Good afternoon, Your Honor, Amanda Gaynor from the Federal Public Defenders Office in the Middle District of Pennsylvania.

I am here with my colleague Gene Ohm, from the Washington, D.C. office. I believe also on the phone is my co-counsel, Lori Ulrich, who can't be here today. She is on a COVID quarantine.

**THE COURT:** Yes, we heard. I hope she is feeling better soon.

**MS. GAYNOR:** Thank you.

**THE COURT:** Thank you, Counsel.

1           So there are a few motions still pending as to  
2       which additional things have been filed.

3           As I indicated in communication through Ms. Lesley  
4       with counsel, I am interested in really hearing argument on  
5       two questions. The first is on the 1512(c)(2) count.  
6       Assuming I don't reconsider my substantive holding, whether  
7       the indictment as currently framed is adequate. I want to  
8       hear argument on that question. And then the other  
9       question, which was presented in the hearing that just  
10      concluded as well, whether the venue motion should be  
11      granted.

12          So I think I'd like to start with the government,  
13      hear from you on -- I don't know if you are going to split  
14      those issues and if you are, I am happy to hear from you in  
15      either order. Then I will hear from defense counsel, give  
16      the government a very short time for rebuttal. I am happy  
17      to hear from either of you in whatever order you would like.

18           **MS. LOEB:** Your Honor, I am going to address the  
19      venue change issue.

20           **THE COURT:** Very well. Yes.

21           **MS. LOEB:** Your Honor, Defendant's Motion to  
22      Change Venue should be denied; and that's because this isn't  
23      a question of trying to find some plutonic ideal of a  
24      district where no one has heard anything about the events of  
25      January 6th, and that's true for two reasons. First of all,

1 the standard from the *Skilling* case is that the defendant  
2 has to demonstrate extraordinary prejudice, which is a  
3 standard the defendant has not met.

4 Second of all, the Court isn't looking for jurors  
5 who haven't heard anything about the news; that's not the  
6 question. People who follow the news who are well-informed  
7 can be perfectly suitable jurors. The question is whether  
8 those people can put aside what they know and decide the  
9 case on the facts before them.

10 **THE COURT:** So, as I explored with counsel earlier  
11 today, four January 6th cases have gone to trial in front of  
12 juries. I believe it is four. There have been bench  
13 trials, but I think it is irrelevant for present purposes.  
14 Each of those judges, based on the individualized  
15 circumstances of the defendant, the questions that were  
16 asked, the potential jurors, ultimately was able to seat a  
17 jury, so to speak.

18 So my question is really a question I also asked  
19 the government earlier which is, Do you agree that if we got  
20 to jury selection, and that if I had a different experience,  
21 and that we found a pool that was very difficult to qualify  
22 enough jurors to get to peremptories, that at that point it  
23 might be appropriate to consider a change of venue?

24 **MS. LOEB:** Yes. Yes. I agree with that. We  
25 could talk about what "very difficult" means.

1           **THE COURT:** It's at least hypothetically possible,  
2 in your view, that even if the venue motion isn't granted  
3 now, either because I hold it or because I deny it without  
4 prejudice to refile later, that it's theoretically  
5 possible that as a result of jury selection we wouldn't have  
6 to just keep trying and trying; that maybe I could conclude  
7 that a change in venue was appropriate at that time.

8           I recognize the government's view is that would be  
9 probably be very difficult to satisfy, the standards are  
10 incredibly high, but it's at least theoretically possible in  
11 your view.

12           **MS. LOEB:** It is, Your Honor. I would also like  
13 to talk about what we've seen in some of those recent  
14 trials --

15           **THE COURT:** Yes, please; that would be very  
16 helpful.

17           **MS. LOEB:** -- in terms of what the experience has  
18 been.

19           **THE COURT:** Yes.

20           **MS. LOEB:** I think what we've seen is that voir  
21 dire has been very successful in identifying unbiased  
22 jurors; and that it's done so without requiring undue time  
23 or effort by the District Court.

24           So to take the most recent example, the *Thomas*  
25 *Webster* case, the Court questioned 53 jurors. The Court was

1       able to qualify 35, after striking 18 jurors for cause.

2               **THE COURT:** For whatever cause, obviously.

3               **MS. LOEB:** Right. Right.

4               So as Judge Mehta explained, of the 18 who were  
5       struck for cause, only half of them were struck either  
6       because they expressed an inability to be impartial or  
7       because they had some connection to the event.

8               So in the Webster trial, we are looking at 9  
9       jurors out of 53 who were questioned; so that's just about  
10      17 percent. That is also in line with what we saw in the  
11      Reffitt trial and the Robertson trial.

12              In Reffitt, the percentage is about 14 percent.  
13      So 8 of the 56 prospective jurors, again claim to have such  
14      strong feelings that they could not set aside, they could  
15      not be fair and impartial, and they were struck for cause.  
16      And in the Robertson trial, only about 9 out of 49 jurors  
17      were struck for cause on this basis. So we are looking at  
18      under 20 percent for each of those three trials so far.

19              And in none of those cases -- I believe in all of  
20      those, jury selection was finished in about a day, maybe a  
21      little spillover but pretty much a little more than a day.  
22      So I don't think we are not seeing signs of extreme  
23      prejudice in the jury pool here.

24              **THE COURT:** And --

25              **MS. LOEB:** And voir dire also offered an



1 opportunity to pose the kinds of questions -- the parties,  
2 of course, both had opportunities to suggest questions and  
3 the Court was involved. During the voir dire process, they  
4 were able to ask questions to try to ferret out a bias that  
5 couldn't be set aside.

6 **THE COURT:** It seems to me that there either are  
7 or theoretically should be some cases in which the courts  
8 have concluded that they need not wait for jury selection.  
9 Am I right about that? It seems to me that there must have  
10 been venue motions, change of venue motions, granted on  
11 these questions where the Court said, Hey, we don't want to  
12 wait for voir dire. Otherwise, that would always be the  
13 answer.

14 So what distinguishes the cases where the motions  
15 have been granted from those where the courts have said,  
16 Well, we can just deal with this at voir dire?

17 **MS. LOEB:** I can think of a couple of situations  
18 where that's happened. So that could happen if there was a  
19 -- if the Court found that there was a presumption of  
20 prejudice, which is the standard that is outlined in  
21 *Skilling*, using the various *Skilling* factors. So it is  
22 theoretically possible that if that the defendant makes a  
23 showing of extraordinary prejudice before trial, the Court  
24 can grant the motion.

25 Now, the Supreme Court has not found a case that

1 meets that standard in 50 years. And in cases such as  
2 *Rideau* -- and not even in *Skilling* did the Supreme Court  
3 find that there was that presumption before trial. The  
4 cases -- the Supreme Court cases *Rideau* and *Irvin* are  
5 readily distinguishable from the case here. They both  
6 involved small communities, which were saturated with  
7 extremely prejudicial news, specifically news in both cases  
8 that the defendants had confessed. And not just confessed  
9 to any crime but confessed to the crime of murder, which I  
10 think has an extreme, acute effects on the local community.  
11 And there was also a showing there that the news reached  
12 very high percentage of houses in the small community.

13 Our briefing discusses *Rideau* in depth.

14 **THE COURT:** Yes.

15 **MS. LOEB:** So I won't describe it any further.

16 **THE COURT:** So just to play that out a little bit,  
17 so essentially what implicitly maybe the Courts must have  
18 concluded is in those circumstances the concerns can't be  
19 obviated through voir dire. Even if you could  
20 hypothetically find 35 people who haven't heard about the  
21 issue or didn't read the news, it's so permeating, the  
22 venire, that we are not even going to try. That must be  
23 sort of implicit in that.

24 Does any Court discuss that? Essentially say, It  
25 has been suggested we can go to voir dire and see if there

1 is a problem here, but we know there is a presumption of  
2 prejudice so we are not even going to bother.

3 **MS. LOEB:** Aside from *Irvin* and *Rideau*, there are  
4 cases that are coming to mind. I do want to mention  
5 *McVeigh*, because there the Court did transfer the venue  
6 without going through voir dire. But there the government  
7 agreed that the trial could not take place in Oklahoma City.  
8 So the question was, What will the alternative venue be?  
9 The government wanted the trial to be in Oklahoma and the  
10 district judge instead settled on Colorado.

11 *McVeigh*, I think, is also readily distinguishable  
12 from this case. The pretrial publicity gave a lot of  
13 attention specifically to Timothy McVeigh, who was splashed  
14 across the media, in a way that Mr. Fischer has not been.

15 **THE COURT:** Is that, from your perspective,  
16 essentially a requirement for such a motion that the  
17 defendant specifically is well-known to the venire or is  
18 that not necessarily a requirement?

19 **MS. LOEB:** It's hard to say that -- I suppose  
20 there could theoretically be a case where that is not there.  
21 But I think it is, just as a matter of human experience, if  
22 people aren't familiar with an individual in front of them,  
23 it is going to be easier for them to set aside their views.  
24 And I think their views may not be as fixed, if they haven't  
25 seen coverage relating to that specific person.

1 But I think *McVeigh* is also distinguishable  
2 because just the horrendous crime which so acutely affected  
3 Oklahoma City. Here I they think we are dealing with a  
4 crime that has a more nationwide harm. I don't want to  
5 minimize the importance of what happened here, but over 100  
6 people dying in a bombing, including victims who were  
7 children, is a really extraordinary crime in terms of the  
8 affect on the local community.

9 **THE COURT:** So imagine or assume that I don't  
10 think I should grant the motion at this time, and that I  
11 either deny it without prejudice or hold it in abeyance or  
12 whatever and say, Look, other judges have had this  
13 experience with the voir dire. So let's table the question  
14 until we can see whether we can pick a jury here. I think  
15 the defendant says, Well, I want a jury questionnaire as a  
16 precondition or precautionary bias. What is the  
17 government's view on that?

18 **MS. LOEB:** Our view is a jury questionnaire is not  
19 necessary, especially since we have now seen voir dire in  
20 four trials function in a time-efficient manner. The judges  
21 have allowed the parties to ask follow-up questions.

22 I will say one drawback of a questionnaire is you  
23 can't gauge the demeanor of the person as they are giving  
24 the response. So we certainly don't think a questionnaire  
25 is a substitute for voir dire, and we think voir dire is

1       adequate here.

2               **THE COURT:**   Would there be any harm, in the  
3       government's view -- again, assuming I don't grant the venue  
4       motion now -- in allowing the defendant to propose what he  
5       has in mind by way of a questionnaire, and then the  
6       government can respond to it, including by telling me I  
7       shouldn't use one?

8               **MS. LOEB:**   Just my time, Your Honor.   So, no.

9               **THE COURT:**   It's important.   My time too.

10              **MS. LOEB:**   No, I mean, I think -- I suspect our  
11       position will be that we don't think the questionnaire is  
12       necessary, but we are certainly happy to look at proposed  
13       questions.   And if there is something that we haven't  
14       thought of that should be expressed in writing we could  
15       consider it.

16              **THE COURT:**   Okay.   Thank you.

17              Anything else on this question?

18              **MS. LOEB:**   If Your Honor doesn't have any further  
19       questions, no.   Thank you.

20              **THE COURT:**   Thank you.   Thank you, Counsel.

21              Mr. Pearce, why don't I hear from you, and then I  
22       will hear from defense counsel on these two issues.

23              Obviously I recognize the government disagrees  
24       with my decision in this case and *Miller* and the like on  
25       1512(c)(2).   I don't want to hear argument on that.   I

1 understand the issues very well. I've read Judge Bates'  
2 opinion from yesterday. So on that question, obviously, I  
3 understand the issues.

4 What I want to explore with you is whether and to  
5 what extent, assuming I don't reconsider my position or my  
6 decision, whether the indictment here is adequate; and  
7 that's really what I would like to hear from you on.

8 **MR. PEARCE:** Certainly.

9 Of course we would like you to reconsider but  
10 understand the focus of today --

11 **THE COURT:** I understood that. I understood that  
12 from your papers. The position is clearly preserved, no  
13 doubt.

14 **MR. PEARCE:** Sure.

15 **THE COURT:** But I do want to hear you on this  
16 question.

17 **MR. PEARCE:** So in our view -- and it's in our  
18 reconsideration motion and other cases like *Miller* that are  
19 before you -- the statutory language in 1512(c)(2) and the  
20 specification of the official proceeding here is one -- the  
21 certification proceeding on January 6th, as sort of set out  
22 in the 12th Amendment of the Constitution and in the  
23 Electoral Count Act in 3 United States Code, 15 to 18 -- in  
24 our view establishes a proceeding in which -- and perhaps I  
25 should back up and say, there is some question from the

1 government's perspective about precisely what it is that the  
2 Court requires or envisions requiring the government to  
3 prove. In other words, what does it mean for a defendant to  
4 "take action with respect to a document?"

5 We make the argument here in our brief here and  
6 elsewhere that we think -- essentially that's the  
7 instruction to the jury, that we can get up and we can say  
8 to the jury, Defendant Fischer, in this case, he took  
9 actions directed at this proceeding. The proceeding  
10 involves the consideration of certificates that come in from  
11 the electors that are considered by Congress. We can put on  
12 more specific evidence that shows how on January 6th itself,  
13 I think it was the General Counsel to the Secretary of the  
14 Senate, who comes in with some of his additional colleagues  
15 and removes those ballots and other documents from the  
16 proceeding that, in this case, Mr. Fischer's conduct is  
17 taking action with respect to a document.

18 So that -- I think that's perhaps addressing two  
19 different things at once. One is that the indictment  
20 adequately alleged a proceeding that involves documents,  
21 records, et cetera, by invoking the constitutional and  
22 statutory provisions. And the broad statutory language  
23 about obstructing, impeding, influencing an official  
24 proceeding captures and does what it needs to do. It  
25 certainly alerts the defendant as to the conduct against

1 which he must defend himself.

2 **THE COURT:** So one of the things you argue in your  
3 brief is that it is sufficient for constitutional or other  
4 requirements for the indictment to essentially use the  
5 language of the relevant statute, I think, so long as the  
6 statute itself contains all of the elements of the crime.

7 Here the statute -- we all know what 1512(c) and  
8 (c)(1) and (c)(2) say. There is nothing in there about the  
9 certification of the electoral college and the like. Is the  
10 government's view that if the indictment had merely quoted  
11 from the statute said, On January 6th, Fischer violated 18  
12 U.S. Code, 1512(c)(2), maybe even quoted it, but didn't  
13 identify the official proceeding, that that would or would  
14 not have been adequate?

15 **MR. PEARCE:** Clearly it's a much harder case. So  
16 the *Murphy* case out of the First Circuit, an older case,  
17 suggests where an indictment fails entirely to identify an  
18 official proceeding, that not only fails the constitutional  
19 but also the Rule VII requirement to set out a concise  
20 statement.

21 **THE COURT:** What is that? What is it about not  
22 identifying the official proceeding at issue that is the  
23 problem?

24 **MR. PEARCE:** So as I understand that case and sort  
25 of the principle underlying it, it's that a defendant



1 doesn't know what he or she must defend against. In that  
2 particular case, back to *Murphy*, there was both, I think, a  
3 grand jury proceeding and potentially some other proceeding.  
4 And it's escaping me now what it was. In fact, I think in  
5 the government's opening brief it suggested it was going  
6 with potentially one or the other. I think the Court said,  
7 you know, Listen, the defendant has to know what it is he  
8 must defend himself against. Right?

9 And so mapping that on to here -- and I recognize  
10 I am getting a little bit away from the hypothetical, but I  
11 think the indictment in this case clearly identifies the  
12 certification proceeding, as I mentioned before, invokes the  
13 constitutional and statutory --

14 **THE COURT:** Yeah, but -- I think "all" would  
15 acknowledge. It doesn't say anything in the -- I'm talking  
16 about the indictment itself, not that there aren't facts  
17 that couldn't be put in the indictment. The indictment  
18 itself doesn't say anything about -- and I get the  
19 government's view, We don't know exactly what you mean. It  
20 doesn't say anything about how Mr. Fischer may have acted or  
21 taken action with respect to a document of record. There is  
22 nothing in the indictment about that.

23 **MR. PEARCE:** So I agree that explicitly there is  
24 not. Implicitly, our view is because -- and I will repeat  
25 myself, but I will make it quick --

1           **THE COURT:** Because the particular proceeding is  
2 the kind -- I'm paraphrasing you but just so I have it.  
3 Because the particular proceeding is of the kind at which  
4 records exist or documents are relevant or something like  
5 that. It necessarily includes within it this gloss that  
6 you, Judge Nichols, have imposed on the statute.

7           **MR. PEARCE:** Basically that's right. And now to  
8 get back and try to squarely answer your hypothetical, if an  
9 indictment said "any official proceeding" and there was some  
10 legitimate question as to what that proceeding was, I think  
11 that there is a strong argument for a defendant to say,  
12 Look, it's not even clear that this proceeding even involves  
13 documents, records or other objects, you know. Therefore,  
14 it's defective under probably, at least Rule VII or maybe  
15 not constitutionally, and therefore, you know, it should be  
16 dismissed potentially for the government to go back and put  
17 in the facts, if those exist, to allege that.

18           Again, I think here we don't need to do that  
19 because of the argument I think you just accurately  
20 paraphrased.

21           **THE COURT:** I do have one question which is just  
22 about practice here. Indictments in some of these January  
23 6th matters have had some sort of lead-in facts description  
24 before getting to the counts. So the judges who are  
25 considering whether the indictment, you know, adequately

1 states whatever - I guess whatever the argument is -- is  
2 able to rely on almost, like, an introductory statement of  
3 facts.

4 Do you have a sense for why that is true in  
5 certain indictments in these January 6th cases and not true  
6 in others like this one? The thing about this one is, it is  
7 pretty sparse, certainly as it relates to other indictments,  
8 even in January 6th cases. Is that just a function of  
9 different cases being brought by different prosecutors or is  
10 there something else going on?

11 **MR. PEARCE:** So this indictment is closer to the  
12 majority of the indictments in the January 6th cases. It is  
13 true that there are a non-trivial number of speaking  
14 indictments, indictments that include often some sort of  
15 background and then more specific factual recitation.

16 Just as an example, in *United States versus*  
17 *Rhodes*, a case that charges seditious conspiracy, that  
18 indictment is, I think, 30-some-odd pages -- or at least  
19 Count 1 is -- and 134 paragraphs. That is obviously very  
20 different in content than the indictments here.

21 That's not a function of just, you know, what one  
22 prosecutor does versus another. Some of it has to do with  
23 the nature of the allegations at issue. So in that  
24 particular case, it's a conspiracy charge. It's a number of  
25 defendants, you know, that are charged together.

1           None of that, in our view or to my knowledge, is  
2           legally required in one way or the other. I mean, again,  
3           there are obviously federal rules and constitutional limits  
4           at some point.

5           **THE COURT:** Right. And I wasn't suggesting it  
6           was. It was really just --

7           **MR. PEARCE:** Why some and not others.

8           **THE COURT:** -- why some and not others. Yeah.

9           **MR. PEARCE:** Right.

10          So as I said, the indictment in this case is much  
11          more reflective of the majority of the indictments in  
12          January 6th cases. It tends to do with, in some respects,  
13          the number of defendants or the type of charges that are at  
14          issue.

15          **THE COURT:** I hesitate to ask this because I asked  
16          it once already with respect to other counts in this case,  
17          which we'll address at the end of the hearing, I think,  
18          about Vice President Pence as the temporary visitor. And,  
19          hey, if he may not have been, there were concededly members  
20          of his family that were. That seems to be a conceded point.  
21          Are you interested in going back to getting that added to  
22          the indictment? The government said, No, no. We are good.

23          Do you have a view about whether -- if I were to  
24          conclude -- not saying I'm there -- that the indictment  
25          needs to have something more about a record or some

1 additional information in it, about whether the government  
2 would be willing to go back to the grand jury to include  
3 that information or if it would, basically, stand on the  
4 indictment as-is?

5 **MR. PEARCE:** I will give the entirely satisfactory  
6 answer of "it depends." I think a lot would turn on what  
7 this Court would say -- again, what it means for defendant  
8 to take some action with respect to a document, record or  
9 other object.

10 I mean, I think if it were simply to spell out the  
11 provisions that are encoded in the Twelfth Amendment and the  
12 Electoral Count Act. Certainly that wouldn't be  
13 particularly hard to do. Again, in our view, it would be  
14 unnecessary but would not be complicated.

15 If there was a requirement that it have more  
16 specifically to do with the defendant's actions with respect  
17 to a document, you know, I think that might be more  
18 challenging. You know, I think speaking candidly about this  
19 case and others, there are probably not a whole lot of  
20 defendants who, if the view is they needed to have  
21 physically laid hands on a document or other object, grab --  
22 you know -- nobody touched an electoral ballot, to the  
23 government's knowledge, those allegations just don't exist  
24 in a case like that.

25 **THE COURT:** I mean, it seems to me that we are --

1 I take very seriously the notion that we are at the Motion  
2 to Dismiss the Indictment stage, which is a very low  
3 threshold.

4 **MR. PEARCE:** A low bar.

5 **THE COURT:** Or a high one.

6 **MR. PEARCE:** Judge Hogan called it a low bar  
7 recently.

8 **THE COURT:** Right. Exactly. Depending --

9 **MR. PEARCE:** Who's --

10 **THE COURT:** If it's defendant's motion, it's very  
11 high.

12 **MR. PEARCE:** -- it --

13 **THE COURT:** Exactly.

14 So I don't think that -- I'm not thinking that the  
15 requirement would be to -- well, I guess I'm not sure.

16 I understand your view. I understand that -- I  
17 guess a different way to put it is, in your brief you argue,  
18 Of course the indictment is satisfactory because we have a  
19 different view of 1512(c)(2). But even if your view, Judge  
20 Nichols, continues to be your view, we can satisfy it  
21 because -- and then there is essentially a statement in your  
22 brief, sort of an encapsulation of what you could prove.

23 And what I was really thinking is, if something  
24 like that -- which is really, like, almost a one-sentence  
25 thing about Fischer's actions generally or in the

1 indictment. My question for defense counsel, of course,  
2 will be, Would that be sufficient? Assuming my opinion on  
3 1512(c)(2) stands.

4 And the question is, since you've essentially  
5 written it and you think you could prove that, the statement  
6 in your brief, would you be prepared to go to the grand jury  
7 to get that and the indictment? That's really, I think, the  
8 question.

9 **MR. PEARCE:** Yeah. And I'm hesitant to give an  
10 answer because I think, as I'm sure the Court understands,  
11 this has system-wide consequences. And we don't want to be  
12 in a position where what we need to prove to establish a  
13 violation of 1512(c)(2) is different in this courtroom than  
14 it is down the hall.

15 So I agree that I think it would be relatively  
16 easy to go back and insert those allegations; and that,  
17 potentially, could get us past the low bar at the Motion to  
18 Dismiss stage. As I said, for those sort of systemic  
19 consequences, I don't think I can commit at this point to  
20 say, That's what we would do.

21 **THE COURT:** Fair enough. Thank you, Counsel.

22 **MR. PEARCE:** Thank you very much.

23 **THE COURT:** Ms Gaynor.

24 **MS. GAYNOR:** Good afternoon, Your Honor.

25 **THE COURT:** Good afternoon.

1           **MS. GAYNOR:** What would you like me to address  
2 first?

3           **THE COURT:** I'm happy to have you take them in  
4 whatever order you like.

5           **MS. GAYNOR:** I think since we were just talking  
6 about 1512, it makes sense to sort of stay with that topic.

7           **THE COURT:** Please.

8           **MS. GAYNOR:** Since it's fresh for both of us.

9           So I kind of want to go to the point you were  
10 really just talking about with Mr. Pearce about the  
11 government's -- essentially their alternate theory that they  
12 presented in that sentence that you were discussing in the  
13 brief.

14           I really think that based on the way my reading of  
15 *Miller*, and subsequently *Fischer*, your holding is that  
16 Mr. Fischer must have done something himself concrete,  
17 tangible -- maybe tangible is not the right word -- but  
18 concrete toward a document, record or other object.

19           And I think we can all agree, based on what we  
20 know about this case, that's not what happened. He didn't  
21 lay hands on the ballots. And I don't think that your  
22 ruling in *Miller* and *Fischer*, and your construction of the  
23 statute, permits this theory of his conduct, by entering the  
24 Capitol that day, had this natural and probable effect --  
25 those are the words in the government's brief -- of



1       destroying or impeding or imparling the ballots.

2               I just think that's a bridge too far. And I  
3       think, truly, I mean, that is why they filed -- the  
4       government's filed their reconsideration motion. Because  
5       they can't -- well, there is a variety of reasons why they  
6       filed their motion. But they can't fit the facts of this  
7       case into your construction of 1512(c)(2).

8               **THE COURT:** I of course understand that is your  
9       view, but why isn't that a question for trial? When we are  
10      talking about just what the indictment needs to allege, why  
11      isn't it sufficient, as it is now, or why wouldn't it be  
12      sufficient for the government to have a theory that, you  
13      know, if they even had to add something more to the  
14      indictment that it would at least provide notice as to what  
15      their theory was, and then we would have a trial about  
16      whether, based on my jury instructions, the evidence gets  
17      them there. Why isn't that a trial question rather than a  
18      dismiss-the-indictment question?

19              **MS. GAYNOR:** Right.

20              Backing up then one step, I think looking at Rule  
21      VII, requires the indictment to contain the essential facts  
22      that constitute the offense. And here, based on the  
23      construction of the statute that's been set forth by the  
24      Court, an essential fact is the action that was taken  
25      towards the record, evidence, object.

1           Now, I understand the government's now arguing  
2           that the existence of the electoral college proceeding  
3           implies that there were ballots. It implies that there were  
4           documents --

5           **THE COURT:** Let me just pause you there for a  
6           second.

7           **MS. GAYNOR:** Sure.

8           **THE COURT:** Look at Count 2. What facts does  
9           Count 2 have it in?

10          **MS. GAYNOR:** Well, I mean, to be perfectly frank,  
11          there is a lot of sparsity in this indictment. That's been  
12          our complaint, not only in this case and other cases that  
13          we've had. They really are just, essentially, citing  
14          statutes. They are not giving a lot of facts.

15          **THE COURT:** The government says that's adequate.

16          **MS. GAYNOR:** And perhaps for some charges it is.  
17          For example, Count 2 -- so Count 2 -- okay. So a forceable  
18          assault, resist, oppose, impede; those are actions that a  
19          person takes with respect to the law enforcement officer;  
20          that's the object of the action. And here they haven't  
21          identified what the object of the action is.

22          **THE COURT:** In Count 3?

23          **MS. GAYNOR:** Aside from saying the it was the  
24          ballots and the electoral college.

25          **THE COURT:** Right. I mean, Mr. Pearce, basically

1 says, Look -- I'm going to paraphrase, of course -- we cite  
2 the statute, we cite the date, we have identified the  
3 relevant proceeding. And because we identify the relevant  
4 constitutional provisions and statutory provisions, which  
5 necessarily require a document or records to exist and be  
6 around, that provides your client with as much notice and/or  
7 the grand jury passed on as much specificity in Count 3 as  
8 it did in Count 2. What is wrong with that argument?

9 **MS. GAYNOR:** Well, it doesn't fit into the  
10 construction of 1512(c)(2) that Your Honor set forth in his  
11 opinions. Because, as you noted in your opinion, there are  
12 no facts that imply -- suggest or imply or state with any  
13 precision that our client took any action with respect -- he  
14 himself took any direct action with respect to a document,  
15 record, piece of evidence.

16 **THE COURT:** But does the indictment have to say  
17 that? That's my question.

18 **MS. GAYNOR:** I think it does. I think, if we  
19 construed the statute in a way that is perhaps -- I mean, so  
20 one of the big issues in this case is whether or not there  
21 was clarity in the statute. Everyone disagreed about that.  
22 Now we have a ruling that says, Yes, there is a lack of  
23 clarity, but this is what it means.

24 So if we've narrowed the clarity down or if we've  
25 put a finer point on things, I think then to allow the

1 government just to have a simple recitation of the statute,  
2 just gets them back to where they were before we went even  
3 went through this exercise of arguing these motions, truly.

4 **THE COURT:** Well, but what it means, I suppose is,  
5 in the government's view, Count 3 would survive --

6 **MS. GAYNOR:** Uh-huh.

7 **THE COURT:** -- either as it's currently pleaded,  
8 so to speak, or perhaps with, you know, as you haven't  
9 exactly invited, but you've suggested the government could  
10 go back to the grand jury and get a superseding indictment  
11 that could include a little bit more information.

12 What we would then have, though, is we would have  
13 a case where everyone knows that going to trial, the  
14 government's proof is going to be -- is going to have to be  
15 directed at a particular construction of the statute.

16 In other words, it's not as if just because the  
17 indictment might survive on this theory that the case isn't  
18 otherwise a different case than it would have been absent  
19 their filing.

20 **MS. GAYNOR:** Right.

21 **THE COURT:** They would still have to prove the  
22 case based on my instructions to the jury about what it  
23 requires to have violated 1512(c)(2).

24 **MS. GAYNOR:** Yes. And I understand that  
25 completely and I understand that point, but I still believe

1       that the indictment should contain an essential fact, which  
2       would be the conduct -- and it doesn't have to be overly  
3       descriptive, but I think the indictment still needs more  
4       here about what the action was that was taken, and what the  
5       object of that action was.

6               **THE COURT:** One of the things I'm struggling with  
7       is, at least as you look at just this indictment, some of  
8       the other counts don't really seem to have --

9               **MS. GAYNOR:** Sure.

10              **THE COURT:** -- the kind of specificity you are  
11       talking about.

12              Count 6 basically says, Fischer engaged in  
13       disorderly and disruptive conduct with the intent to impede  
14       disrupt, disturb. It doesn't say what he did.

15              **MS. GAYNOR:** What he did. Right.

16              **THE COURT:** It just says he did it. He did this  
17       thing that is the language in the statute. Why isn't that  
18       inadequate, in your view, if Count 3 is?

19              **MS. GAYNOR:** Right. So I think -- to be perfectly  
20       frank, I think -- you know, Count 3 has presented a lot of  
21       issues with, What does it mean, in context of January 6th  
22       prosecutions. Disruptive, disorderly conduct, I mean, that  
23       is something laypeople understand and lawyers understand  
24       sort of on a -- it's just sort of a simple level we get.

25              **THE COURT:** One line that one might draw from the

1 case is that it's okay to essentially parrot the language of  
2 the statute, so long as the language of the statute is  
3 commonly understood to have a particular meaning by most  
4 people. But it's not enough to parrot the language of the  
5 statute, in the event there is, you know, the language of  
6 the statute isn't clear to most people or there is a  
7 substantial limitation that you can't find within the  
8 language of the statute. Is that, maybe, the way in which  
9 you would distinguish Counts 3 and 6?

10 **MS. GAYNOR:** Yes. Absolutely.

11 **THE COURT:** Okay.

12 **MS. GAYNOR:** Thank you for that.

13 **THE COURT:** Sure. So I have a procedural  
14 question.

15 **MS. GAYNOR:** Sure.

16 **THE COURT:** There have been a couple cases which  
17 I've had the 1512(c) question in front of me. I believe, in  
18 this one -- so Mr. Fischer moved to dismiss Count 3 of the  
19 indictment.

20 **MS. GAYNOR:** Right.

21 **THE COURT:** The government responded. And of  
22 course the government's main argument is 1512(c)(2) is not,  
23 as you have now interpreted it, Judge Nichols, but as to  
24 most of the rest of the bench has interpreted it, so you  
25 can't dismiss the indictment on that grounds.

1 I think there is a question whether the government  
2 made, at that time, the alternative argument as fully as its  
3 making now, about whether the indictment was nevertheless  
4 adequate, even if you took the narrowed interpretation that  
5 you proposed and I adopted. We are now at the Motion for  
6 Reconsideration stage. The government is clearly making the  
7 argument that I got 1512(c) wrong -- and in any event, even  
8 if I didn't, the indictment is inadequate.

9 You've responded to those arguments, but have not  
10 argued that the government somehow forfeited the fallback  
11 argument. Do you agree that I absolutely can reach that  
12 fallback argument now, at a minimum either because there is  
13 a Motion for Reconsideration or you forfeited your  
14 forfeiture argument?

15 **MS. GAYNOR:** Well, I don't want to forfeit my  
16 forfeiture argument, but I also want the issues in this case  
17 to be handled correctly and we want the record to be clear.

18 I think really at the end of the day we -- the way  
19 -- the posture of the case right now is that Count 3 has  
20 been dismissed without prejudice. I know that we have this  
21 pending reconsideration motion. But I really think if the  
22 government wants to persist -- assuming you deny the  
23 reconsideration motion as it relates to your interpretation  
24 of 1512(c), if the government wants to persist on a 1512  
25 charge against my client, I really believe the ball is in

1       their court to go back to the grand jury.

2               **THE COURT:** They have two alternatives. One is  
3 they could, of course, appeal.

4               **MS. GAYNOR:** True.

5               **THE COURT:** Seek to appeal. Or they could go back  
6 to the grand jury. There would be a superseding indictment.  
7 Again, I am not saying they have to, of course. I am just  
8 exploring these questions. But if they went back to the  
9 grand jury and got a superseding indictment, the original  
10 Motion to Dismiss Count 3 is essentially mooted out.

11              **MS. GAYNOR:** Right.

12              **THE COURT:** And I would have to consider a new --  
13 assuming you renewed your motion -- whether to grant it at  
14 that point. So these issues would be right back in front of  
15 me.

16              **MS. GAYNOR:** Right.

17              **THE COURT:** Fair enough.

18              **THE COURT:** So let's talk venue.

19              **MS. GAYNOR:** Sure.

20              **THE COURT:** Okay.

21              **MS. GAYNOR:** Okay.

22              **THE COURT:** Why should I not just wait?  
23 Especially given the experience of three or four of my  
24 colleagues? I know Judge Walton's trial was unique. And my  
25 understanding is there was some agreement among the parties



1 to have a slightly different, than typical, jury selection.  
2 But as to three of them, as Ms. Loeb articulated, of the  
3 venire, something less than 20 percent were excluded for  
4 cause because of the issues or the types of issues that you  
5 argue require --

6 **MS. GAYNOR:** Transfer.

7 **THE COURT:** -- on a very high standard transfer.

8 **MS. GAYNOR:** Sure.

9 **THE COURT:** So we have three cases, 80 percent or  
10 more in each case, 3 different judges here have concluded  
11 can sit on a jury. Why isn't that enough, at least for me  
12 to conclude that I should wait to see how voir dire happens  
13 here?

14 **MS. GAYNOR:** So I obviously agree that Your Honor  
15 can wait or that the motion can be renewed or whatever sort  
16 of procedural posture we put it in and that it could be  
17 renewed.

18 What I'm really interested to see is what happens  
19 as these trials keep going. Because we are at the very  
20 beginning of this now. Right? So there's been four trials.  
21 I know there have been, you know, quite a handful of  
22 defendants that have pled and have been sentenced. You  
23 know, I think there is still something like 500 cases -- I  
24 could be a little bit wrong on that number -- that are  
25 outstanding.

1           So as these keep coming through the mill, I'm  
2       really interested to see what would happen and how the  
3       percentages are going to change. And one of the arguments  
4       that I was going to make about sort of the publicity and the  
5       kind of baked-in prejudices that are happening, really right  
6       as we stand here, in this D.C. venire, has to do with the  
7       fact that this January 6th news cycle is just going to keep  
8       repeating every time we have a new trial and every time we  
9       have a new verdict.

10           I mean, we just saw it yesterday -- yesterday or  
11       the day before, the Webster verdict came out. It splashed  
12       on the newspapers again. So I think it's inevitable that  
13       Mr. Fischer, when he goes to trial, he will be going to  
14       trial on the heels of someone else.

15           I think that to -- I don't think the -- I think  
16       the baked-in prejudices that are already there, which we've  
17       established in the survey, I think they have the clear  
18       potential to only get worse as time goes on as more trials  
19       happen.

20           So we could wait but that could also -- I mean, it  
21       could help us in our motion, because we might have a much  
22       more different jury pool in the fall, early part of next  
23       year, than we do right now.

24           **THE COURT:** Remind me -- not to skip ahead too  
25       much -- but we have not yet set a trial date yet. Correct?

1           **MS. GAYNOR:** We haven't, no. I think we were all  
2           expecting that once these few pretrial issues --

3           **THE COURT:** The of the issues are resolved.

4           **MS. GAYNOR:** -- we can start talking about that  
5           seriously, yes.

6           **THE COURT:** Okay. What's your response to my  
7           question about whether most, if not all of the cases in  
8           which there really has been a change in venue motion that's  
9           been granted, there's really something known about the  
10          particular defendant --

11          **MS. GAYNOR:** Right.

12          **THE COURT:** -- within the jury pool?

13          **MS. GAYNOR:** Sure. It's interesting when you read  
14          this kind of body of case law -- although it's not  
15          necessarily -- well, it is. The *Timothy McVeigh* case. The  
16          names of the defendants attached to these cases are names we  
17          all know. Right? Because they are really notorious  
18          criminal defendants in the federal system. I totally just  
19          lost my train of thought. I'm sorry.

20                 Can you repeat what you just asked me? I  
21          apologize.

22          **THE COURT:** Well, it seems to me what you just  
23          said cuts against your client pretty significantly.

24          **MS. GAYNOR:** Oh, yes. I knew where I was going.

25          **THE COURT:** Because -- well, go ahead.

1           **MS. GAYNOR:** Okay. Thank you.

2           So January 6th is such a different event than  
3       these discrete crimes that happened, like the Oklahoma City  
4       bombing, for example, or the murder in *Rideau*.

5           It sort of goes back to what I was just  
6       discussing. It's a crime that happened on a particular  
7       date, but it keeps resurfacing in the news for a variety of  
8       reasons. I mean, it's not just the trials I was mentioning.  
9       We got the Congressional investigations, we've got how it  
10      plays into mid-term elections. It's constantly, at this  
11      point, being brought back to the floor. It's not something  
12      that happened in a moment in time. The population of D.C.  
13      the potential jurors are constantly reminded of it.

14          This motion really isn't about Mr. Fischer and his  
15      notoriety, it's about the impact of that day and what  
16      happened on that day.

17          **THE COURT:** Right. I mean it seems to me that the  
18      implications of this motion -- and your argument is that  
19      literally every single January 6th case should be  
20      transferred somewhere else.

21          **MS. GAYNOR:** Well, I'm only here to speak to  
22      Mr. Fischer.

23          **THE COURT:** I understand. But I can think about  
24      what the implications of the argument would be. And that  
25      would mean notwithstanding the constitutional provision that

1 generally requires trials to happen at the location of the  
2 crime, and the fact that the allegations are these  
3 defendants all came here --

4 **MS. GAYNOR:** Right.

5 **THE COURT:** -- engaged in the conduct they engaged  
6 in; that they are nevertheless all -- entitled is the wrong  
7 word, but I am just going to use it -- they all have valid  
8 motions to transfer venue somewhere else. So D.C. is the  
9 one place that no January 6th trial should occur, is the  
10 implication of your argument.

11 **MS. GAYNOR:** Right.

12 It is and we -- again, we understand that this is  
13 an extremely difficult motion for defendants to win. But I  
14 do think that January 6th was such a unique event that  
15 involved so many defendants and also impacted so many people  
16 that we are confronted with just a very unique situation.

17 **THE COURT:** So imagine that I defer the motion or  
18 deny it without prejudice for leave to refile at trial or  
19 whatever, the questionnaire proposition, do you agree that  
20 if I were inclined to at least consider a questionnaire,  
21 that the right procedural course is to have the defendant  
22 propose the questionnaire or at least to negotiate with the  
23 government over one whether there might be one that both  
24 sides could live with. If not, propose it to me. The  
25 government gets a chance to object to it, tell me why I

1 shouldn't do it, and then I do all of that well in advance  
2 of all jury selection efforts?

3 **MS. GAYNOR:** Correct. That would be the plan.

4 I mean, I think we could work with Ms. Loeb and  
5 her co-counsel to come up with the questionnaire that would  
6 be suitable. And if there are areas we object, we would  
7 bring it to Your Honor.

8 It's not going to be, you know, a 500-question  
9 questionnaire. But I do think there are some pointed  
10 questions that could be asked in advance that would help  
11 ferret out some of the -- so that Your Honor would have a  
12 better chance at actual voir dire.

13 **THE COURT:** Right.

14 And just procedurally we'd -- again, assuming  
15 assuming -- we would fold that step of a proposed  
16 questionnaire and the like into the "to be agreed upon" or  
17 "to be set by me" pretrial schedule.

18 **MS. GAYNOR:** Sure. Yeah.

19 I think if you were to deny or defer, really, the  
20 motion, I think that would probably be the next thing that  
21 we should start at least preparing so that we can have that  
22 to you well in advance of any trial scheduling.

23 **THE COURT:** Okay.

24 **MS. GAYNOR:** And I don't think that's something  
25 that needs to happen -- we could work on that now, you know.

1 It doesn't have to happen too close to trial.

2 **THE COURT:** Okay. Thank you, Counsel.

3 **MS. GAYNOR:** Thank you.

4 **THE COURT:** I'm happy to hear from either of you  
5 or both of you, Ms. Loeb or Mr. Pearce. I don't have any  
6 particular questions, but I'm happy to hear from you on  
7 anything you would like to say.

8 **MS. LOEB:** Thank you, Your Honor.

9 On the venue point, I just wanted to point out  
10 that the example of *Enron*, I think, is similar to January  
11 6th. It is something that continued to be in the news. It  
12 involved many different defendants. In fact, it was in the  
13 decision in *Skilling* that the Court found that the passage  
14 of time was one of the factors that actually weakened the  
15 argument for a change of venue. And I think there's good  
16 reason for that, which is the effects in the immediate  
17 aftermath of a crime diminish over time. Defendant talks  
18 about some of those effects in the motion, such as curfews  
19 or closures.

20 **THE COURT:** Right.

21 **MS. LOEB:** We argue those aren't of the kind that  
22 would require venue transfer. But in any event, the effects  
23 of those would diminish over time.

24 **THE COURT:** Thank you.

25 **MS. LOEB:** Thank you.

1           **THE COURT:** Mr. Pearce, anything? You don't have  
2 to.

3           **MR. PEARCE:** I'll make just one very brief point.  
4 The potential rule about there being a -- the language of  
5 the indictment is generally enough, unless there is --  
6 parroting is enough, unless there is substantial limitation  
7 that's not apparent from the face of the statute. I think,  
8 actually, it is already the rule under the Supreme Court's  
9 *Russell* case. And I would just say that -- I think that  
10 that's a 1960s case.

11           **THE COURT:** Yes.

12           **MR. PEARCE:** And I think the Supreme Court, the  
13 D.C. Circuit, other judges on this court have pretty  
14 infrequently found *Russell* to apply. The *Resendiz-Ponce* case  
15 from the Supreme Court doesn't apply it. The *Williamson*  
16 case from the D.C. Circuit. I think Chief Judge Howell in  
17 *Apodaca* doesn't apply it. And I don't think it would apply  
18 here either.

19           **THE COURT:** For the reasons you argued, yes.

20           **MR. PEARCE:** Yes.

21           **THE COURT:** Okay. Thank you.

22           So as to the two motions that were argued today, I  
23 am going to take both of them under advisement. The motion  
24 for reconsideration, I'm still very much contemplating,  
25 especially the question of whether the indictment is



1 adequate, even if I don't reconsider the 1512(c)(2) decision  
2 in *Miller* and here; so that I'm taking under advisement.

3 I'm also taking venue under advisement. I will  
4 say that my very strong inclination is hold effectively hold  
5 it/deny it without prejudice, to be renewed at trial,  
6 depending on how the voir dire goes. But I'm not holding  
7 that today. I just wanted to give you a preview of my  
8 thinking. As I can imagine you likely inferred from my  
9 questions today and, frankly, from the questions I asked  
10 earlier in the McKellop hearing.

11 So there is still the question of the counts about  
12 temporary visiting the Capitol, and I'm prepared to decide  
13 that question today. As everyone knows, in my previous  
14 order, I instructed the government to either amend the  
15 superseding indictment allege that one then-Vice President  
16 Pence's family members attended the certification of the  
17 electoral vote of the Capitol on January 6th or to explain  
18 to the Court why it will not do so.

19 The government responded contending that no  
20 further amendment is necessary because the Vice President  
21 was temporarily victim the Capitol on January 6th within a  
22 meaning of the relative statute stated cite.

23 On the government's reading of the statute, or at  
24 least the government's sort of starkest reading of the  
25 statute, someone can temporarily visit even their only work

1 office or their primary work office. And, in any event, the  
2 government argued in the various papers that just because  
3 Vice President Pence had an office, the so-called ceremonial  
4 office in the Capitol, doesn't mean he couldn't temporarily  
5 visit that office or the rest of the Capitol for that  
6 matter.

7 Fischer posits that this position produces  
8 awkwardness, because anyone who leaves his or her home to go  
9 to their permanent place of work is, according to the  
10 government, merely temporarily visiting that place.

11 I agree with Fischer that that stark reading of  
12 the statute does seem like a stretch, but the indictment  
13 here doesn't relate to Vice President Pence's visit to his  
14 only or even his primary office.

15 Instead, at most he would have visited his  
16 ceremonial office at the Capitol on January 6th, 2021. And  
17 the government is free to prove at trial that he rarely  
18 visited that office. Moreover, Vice President Pence, as the  
19 President of the Senate, provided over joint session of  
20 Congress during the certification of the electoral vote;  
21 that certification proceeding took place, at least in part,  
22 in the Chamber of the House of Representatives, and not in  
23 the Senate Chamber. Again, Vice President Pence  
24 constitutionally only has a role as it relates to the  
25 Senate.

1           So after reading over the papers, the opinions  
2       that have addressed the same arguments, I agree with the  
3       government that no further amendment is necessary at this  
4       time. It is certainly possible the government can prove at  
5       trial that Vice President Pence was temporarily visiting  
6       parts of the Capitol within the meaning of the statute on  
7       January 6th, 2021. I therefore deny defendant's Motions to  
8       Dismiss Counts 4 and 5 of the Superseding Indictment.

9           So that's my holding on that motion -- or in light  
10      of my prior order and the government's briefing, the  
11      defendant's motion is denied.

12           Having already indicated I am going to take those  
13      other motions under advisement, are there any other topics  
14      we should discuss today from the government's perspective?  
15      Is it worth talking about any scheduling issues recognizing  
16      that I still have to decide the Count 3 Motion for  
17      Reconsideration in particular?

18           **MS. LOEB:** Yes, Your Honor.

19           Just the exclusion of time. I know the pending  
20      motions now we have 30 days of tolling. But any tolling  
21      beyond that or the next status.

22           **THE COURT:** Well, I suppose then, should we at a  
23      minimum just schedule another status in this matter and then  
24      assuming that there is no objection from the defendant or  
25      agreement exclude time between today's date and that next

1 status?

2 **MS. LOEB:** Yes, Your Honor.

3 **THE COURT:** And do you believe that 60 days is  
4 appropriate or -- cause obviously I need to decide the  
5 Motion for Reconsideration but I don't have a great sense of  
6 what else is going on discovery wise or otherwise, frankly.  
7 Is 60 days an appropriate period of time from the  
8 government's perspective?

9 **MS. LOEB:** Yes, Your Honor, it is.

10 **THE COURT:** How about from Mr. Fischer's  
11 perspective.

12 **MS. GAYNOR:** We would agree with that too, Your  
13 Honor. Sixty days is appropriate.

14 **THE COURT:** I apologize I'm just looking at my  
15 calendar. Are the parties available for a status on July  
16 6th at 2 p.m.? I think it need not be in person. This can  
17 be on the phone or video.

18 **MS. LOEB:** That works for the government, Your  
19 Honor.

20 **MS. GAYNOR:** And that's fine with us too.

21 **THE COURT:** Um, and just so the record is clear,  
22 Ms Gaynor, Mr. Fischer agrees it is appropriate to exclude  
23 time under the Speedy Trial Act to the extent it's not  
24 already being excluded?

25 **MS. GAYNOR:** Yes, Your Honor, we do.

1           **THE COURT:** All right. So we will do another  
2 status in this matter July 6th at 2 p.m. We will do it by  
3 phone. And I believe that it's in the interest of justice  
4 to exclude time between today's date for the various reasons  
5 discussed, my consideration -- the motions and the like --

6           **MS. LOEB:** And Your Honor, we are also continuing  
7 to produce discovery, specifically the voluminous discovery  
8 that applies across the Capitol riot cases.

9           **THE COURT:** And for that reason as well, that it  
10 makes sense to exclude time under the Speedy Trial Act  
11 between today's date and that next status of July 6th.

12           Anything else from the government's perspective,  
13 Ms. Loeb?

14           **MS. LOEB:** No, I believe defense counsel has a  
15 request but nothing from the government.

16           **THE COURT:** Mr. Ohm.

17           **MR. OHM:** I do but if I could ask for the Court's  
18 indulgence really quick.

19           Thank you, Your Honor.

20           If -- is it possible to do that next hearing in  
21 person? I know that it's burdensome to the government but I  
22 believe --

23           **THE COURT:** Do you object to doing it in person  
24 and on the phone? If the government would like to  
25 participate other than --

1           **MR. OHM:** I don't have any grounds I think to  
2 object to Ms. Loeb being on the phone.

3           **THE COURT:** My recollection is Ms. Loeb lives  
4 quite farred burdensome to require her to come to a status  
5 conference for 15 minutes.

6           **MR. OHM:** As a taxpayer I am with Your Honor on  
7 this we don't take a --

8           **THE COURT:** You would like to be in person?

9           **MR. OHM:** Yes.

10          **THE COURT:** That seems just fine with me as long  
11 as Ms. Loeb you don't have a problem -- I guess I would say  
12 I would leave it to you to decide how you would like to  
13 appear.

14               I certainly as a general matter want to  
15 accommodate defendants' requests to do in-court proceedings.  
16 I am happy to do that here. You are free on the defense  
17 side to appear in person. The government is free to appear  
18 how it would like to.

19               I guess what I would say is, I am anticipating  
20 this will largely be a traditional status conference. Not a  
21 particularly substantive discussion. So you are, of course,  
22 welcome to appear by phone if you would like.

23               If that changes for whatever reason, then you are  
24 free to appear in person as well. So I sort of leave it to  
25 you. I know it's very burdensome to come here for a

1 15-minute hearing.

2 **MS. LOEB:** Thank you, Your Honor.

3 **MR. OHM:** One other question, Your Honor.

4 Mr. Fischer he's here with his wife. His pretrial  
5 conditions allow him to come to Washington, D.C. for the  
6 purposes of court. We have -- we would like permission for  
7 Mr. Fischer to go to some museums before he goes back home.  
8 The government does not oppose our request we just wanted to  
9 --

10 **THE COURT:** I want to make sure, Ms. Loeb, you  
11 don't oppose that.

12 **MS. LOEB:** I don't, Your Honor.

13 **THE COURT:** Would that, Mr. Ohm would that be  
14 today? Today and tomorrow?

15 **MS. GAYNOR:** Today, Your Honor.

16 **THE COURT:** Today?

17 **MS. GAYNOR:** Yes.

18 **THE COURT:** The request is granted. The  
19 government doesn't oppose. It's just today to visit some  
20 museums I don't have a problem with that.

21 **MR. OHM:** Great. Thank you, Your Honor.

22 **THE COURT:** Thank you, Counsel.

23 **MS. GAYNOR:** Thank you, Your Honor.

24 **DEPUTY CLERK:** Court is adjourned.

25 (Proceedings concluded at 2:42 p.m.)

**C E R T I F I C A T E**

I, **Lorraine T. Herman**, Official Court Reporter,  
certify that the foregoing is a true and correct transcript  
of the record of proceedings in the above-entitled matter.

July 15, 2022**DATE**/s/**Lorraine T. Herman**



**CERTIFICATE OF SERVICE**

Counsel for the Appellees certify that we served on this date a copy of the attached supplemental appendix by Electronic Case Filing, or by placing a copy in the United States mail, first class in Harrisburg, Pennsylvania, addressed to the following:

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/s/ Frederick W. Ulrich  
FREDERICK W. ULRICH, ESQ.  
Asst. Federal Public Defender

Date: September 14, 2022